

MDM Declaration Exhibit J

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 SUSANNA MIRKIN and BORIS MIRKIN,

4 Individually and on Behalf of All Others

5 Similarly Situated,

6 Plaintiffs,

7 vs.

No. 18 Civ. 2949(ARR) (RER)

8 XOOM ENERGY, LLC and XOOM ENERGY

9 NEW YORK, LLC,

10 Defendants.

11 -----x

12
13
14 VIDEOTAPED DEPOSITION OF

15 SEABRON ADAMSON

16 Tuesday, November 8, 2022

17 10:06 a.m.

18 Veritext

19 101 Arch Street

20 Boston, Massachusetts 02110

21
22
23
24 Laurie K. Langer, RPR

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<p>1 which is I think what you're doing. But I think you 2 understand what we did. 3 Q. I am, because I'm focusing in my question, I have 4 built this in on your damage calculation. So I 5 understand your position about bullet 3, let's call it. 6 Which is your opinions about whether or not XOOM's rate 7 setting was consistent or not, with the sale agreement. 8 But I'm talking about with respect to 4, after 9 you concluded -- 10 A. Uh-huh. 11 Q. -- the rate was not consistent -- 12 A. Right. 13 Q. -- that your damage model -- 14 A. Right. 15 Q. -- and what they considered relevant was the 16 amount of gross margin that XOOM put on top of its 17 supply cost? 18 A. Are we discussing the Method 1 model or the 19 Method 2 model? 20 Q. Well, it's both; right? 21 A. Well, it's -- 22 Q. Let's start with Method 1. 23 A. Okay. Right. 24 Q. Right. Method 1, what was relevant was the</p> <p style="text-align: right;">Page 66</p>	<p>1 A. The -- between total cost and the rate. 2 Q. Okay. Which is the margin? 3 MR. WITTELS: Object. 4 A. The rate is not the margin. 5 Q. No, I know. 6 A. A rate is not a margin. 7 Q. The delta is. The delta is. 8 A. Okay. We can call that a margin, yes. 9 Q. The delta between the total costs -- 10 A. Right. 11 Q. -- and the rate is -- 12 A. Right. 13 Q. -- the margin; right? 14 A. That -- that -- you can characterize that as a 15 margin. 16 Q. Well, what would you characterize it? 17 A. I would just characterize it as a difference, as 18 a delta. 19 Q. Okay. You're not offering an opinion in this 20 case that under the sales agreement XOOM could not 21 charge more than the regulated utilities rate; right? 22 A. No. I mean, the comparison I made was between 23 supply costs and the rate under this contract. 24 Q. Right. And you're not offering a damage model</p> <p style="text-align: right;">Page 68</p>
<p>1 amount of gross margin that's input on top of its supply 2 costs; right? 3 MR. WITTELS: Objection. 4 A. Of the difference -- if you want to -- you're 5 expressing that as a form -- you're expressing the 6 delta, the difference, right, as a gross margin. That's 7 not exactly how it was calculated. 8 I mean, it was calculated just as there's 9 differences, not any -- you're saying a gross margin on 10 a gross margin calc -- I want to be specific about how 11 you're using the term "gross margin." 12 Q. I didn't think it was tricky. I mean, your 13 report says that you calculated by reference -- by 14 comparing XOOM's margin reports to XOOM's rate setting 15 workbooks; right? 16 A. Right. I was getting to the delta between rates 17 and costs. 18 Q. Okay. 19 A. It's just that it was in the margin setting 20 workbooks. 21 Q. So with respect to Model 1 the relevant 22 consideration was the delta between XOOM's total costs 23 and XOOM's margin? 24 MR. WITTELS: Objection.</p> <p style="text-align: right;">Page 67</p>	<p>1 that compares XOOM's variable rate charges to what 2 customers would have been charged by the utility during 3 the same time period? 4 MR. WITTELS: Objection. 5 A. No. The damage models as we discussed are the 6 two. 7 Q. Right. And you don't intend to offer an opinion 8 about that? 9 A. No. The only thing we used was a, as a graphical 10 comparison on the relationship between supply costs and 11 the utility rate, as an example. But the two models are 12 the two models. 13 Q. Yep. Okay. Are you offering an opinion about 14 what is a reasonable or appropriate margin for an ESCO 15 to charge? 16 A. Well, to build the second model we needed an 17 estimate of a margin. We really didn't have any 18 information that would allow that to be created, since 19 XOOM had, from what we can tell, had never done it that 20 way. They had never tried to calculate a, or they did 21 not present in any way, I can't say that they never 22 tried. They did not present in the rate setting 23 workbooks and other information calculations of any sort 24 like that. So we used the margin from fixed rate</p> <p style="text-align: right;">Page 69</p>

<p>1 customers as a proxy of a rate that XOOM itself had 2 used. I can't go further than that because there's no 3 information.</p> <p>4 MR. MATTHEWS: Can you read my question 5 back, please.</p> <p>6 (Prior testimony read back.)</p> <p>7 "Are you offering an opinion 8 about what is a reasonable or 9 appropriate margin for an ESCO 10 to charge?"</p> <p>11 A. Yeah. Conceptually, yes. Conceptually, yes.</p> <p>12 Thanks for reading that back.</p> <p>13 Q. That's okay. And what is the opinion that you're 14 offering conceptually about that?</p> <p>15 A. Well, I mean, it's obviously related to the 16 contract that we've been discussing, whether it's based 17 on supply costs, that, you know, if the Court were to 18 decide that a margin was allowed, that it can't be an 19 uncapped margin, that's why we made a second calculation 20 using the fixed rate margin as a proxy of what might be 21 an acceptable margin.</p> <p>22 Q. Are you offering any opinion about what is an 23 acceptable or appropriate, a reasonable margin aside 24 from just using XOOM's fixed rate margin?</p> <p style="text-align: right;">Page 70</p>	<p>1 Q. And if he said, "but can you give me a cutoff 2 point? Is there a number that you can assign to that?" 3 Would you be able to give him one?</p> <p>4 MR. WITTELS: Objection.</p> <p>5 A. I wouldn't be able to give him a number on the 6 stand because I wouldn't have the, XOOM's internal 7 information, no.</p> <p>8 Q. Okay. So the margin in your view, --</p> <p>9 A. Uh-huh.</p> <p>10 Q. -- the margin that is appropriate for an ESCO to 11 charge conceptually --</p> <p>12 A. Uh-huh.</p> <p>13 Q. -- is ESCO specific?</p> <p>14 A. Well, again, we're talking about relation to a 15 specific contract, so.</p> <p>16 Q. I'm not.</p> <p>17 A. You're not.</p> <p>18 MR. WITTELS: Don't interrupt him.</p> <p>19 A. I am talking -- sorry. I'm talking about this 20 specific contract. Other ESCOs may have, and I'm sure 21 do, very different contractual forms. And in fact, 22 ESCOs -- even the same ESCO will have lots, may have 23 different pricing, right, under different arrangements. 24 We're talking about variable rate pricing here as</p> <p style="text-align: right;">Page 72</p>
<p>1 A. We haven't offered that opinion, we don't have 2 any information to do that.</p> <p>3 Q. Do you intend to?</p> <p>4 A. If information were to be provided, but that 5 would have to come from XOOM. So I, in the absence of 6 not expecting anymore information to come, no.</p> <p>7 Q. Well, we've gotten talking past each other again. 8 I'm talking conceptually. You've said that it will be 9 for the Court to decide whether a margin can be charged 10 and if so what's appropriate; right?</p> <p>11 A. Right.</p> <p>12 Q. And if we go to trial --</p> <p>13 A. Uh-huh.</p> <p>14 Q. -- and you take the witness stand --</p> <p>15 A. Uh-huh.</p> <p>16 Q. -- and I'm asking you questions and the judge 17 gets frustrated with my questions and says, "let's cut 18 to the chase. Mr. Adamson, what do you think is an 19 appropriate margin for an ESCO to charge?" What would 20 your answer be?</p> <p>21 MR. WITTELS: Objection.</p> <p>22 A. I would say conceptually it's got to be related 23 to the, related to the costs. And in a broad conceptual 24 basis.</p> <p style="text-align: right;">Page 71</p>	<p>1 opposed to fixed rate pricing.</p> <p>2 Q. Uh-huh.</p> <p>3 A. Fixed rate pricing, I think we can all agree, the 4 actual outturn margins could be quite different. A lot 5 depends on timing in that case; right? Okay. So I 6 don't know that there is a "single ESCO number" I don't 7 think that's a meaningful concept.</p> <p>8 Q. Okay. Is there a single ESCO number for variable 9 rates that in your opinion would be a cap on what is an 10 appropriate or reasonable margin?</p> <p>11 A. I don't have a number in mind because I don't 12 know what the, what would be claimed to be the types of, 13 of costs that, to be recovered in that margin. What I 14 don't -- you know, I don't have a number. What I am 15 offering is conceptually that the margin has to be based 16 on something from reality to be meaningful in the 17 context of this contract, and, you know, can't be 18 arbitrary.</p> <p>19 Q. Okay.</p> <p>20 A. But I don't have a number to give you.</p> <p>21 Q. Okay. And would not be able to create one?</p> <p>22 MR. WITTELS: Objection.</p> <p>23 A. Not -- not on the information available right 24 now. I think that would need more inputs than are</p> <p style="text-align: right;">Page 73</p>

<p>1 available at present.</p> <p>2 Q. Okay. You don't have an industrywide opinion</p> <p>3 about what is an appropriate or a reasonable margin that</p> <p>4 an ESCO can charge on a variable rate?</p> <p>5 MR. WITTELS: Objection.</p> <p>6 A. I mean, I probably have a, a rough sense of maybe</p> <p>7 what I would expect roughly the numbers to work out</p> <p>8 about. But, you know -- you know, based on, you know,</p> <p>9 what I -- just a sense of that. I don't have a precise</p> <p>10 number to give you here.</p> <p>11 Q. What -- what are the rough numbers that you</p> <p>12 referred to?</p> <p>13 A. You know, I would be -- I would be -- I wouldn't</p> <p>14 be surprised, having done calculations that, you know,</p> <p>15 you got a number, 15 percent, 20 percent, something like</p> <p>16 that. I mean, you know, here we use the fixed rate one</p> <p>17 and it came out those were on average about 20 percent.</p> <p>18 That -- that is an indicator.</p> <p>19 Q. Okay.</p> <p>20 MR. MATTHEWS: Can we go off the record.</p> <p>21 VIDEOGRAPHER: The time is 12:00 p.m., we</p> <p>22 are going off the record.</p> <p>23 (Short break taken.)</p> <p>24 VIDEOGRAPHER: We back on the record, the</p> <p style="text-align: right;">Page 74</p>	<p>1 MR. ROMAN: Sorry if I'm interrupting. But</p> <p>2 we can't hear anything for people remotely right now. I</p> <p>3 don't know if we're on the record or talking, but I</p> <p>4 can't hear anything.</p> <p>5 MR. WITTELS: We're on the record. Can you</p> <p>6 hear?</p> <p>7 (Pause for technical issue.)</p> <p>8 MR. ROMAN: I just heard Matt. That's good.</p> <p>9 Thank you.</p> <p>10 (Pause for technical issue.)</p> <p>11 A. Can you --</p> <p>12 Q. Yeah.</p> <p>13 MR. MATTHEWS: May I ask you to read that</p> <p>14 back.</p> <p>15 (Prior testimony read back.)</p> <p>16 "All right. And as you</p> <p>17 described earlier, Model 1</p> <p>18 takes the difference between</p> <p>19 those total costs and the</p> <p>20 variable rate that XOOM</p> <p>21 charged?"</p> <p>22 A. Yes.</p> <p>23 MR. WITTELS: Yeah. Objection.</p> <p>24 A. Broadly, yes.</p> <p style="text-align: right;">Page 76</p>
<p>1 time is 12:14.</p> <p>2 Q. Mr. Adamson, let's talk about your damage models</p> <p>3 which relates to the fourth bullet point of your</p> <p>4 assignment --</p> <p>5 A. Uh-huh.</p> <p>6 Q. -- to develop a damage model.</p> <p>7 A. Uh-huh.</p> <p>8 Q. And you and Dr. Eryilmaz --</p> <p>9 A. Eryilmaz.</p> <p>10 Q. -- developed two models; --</p> <p>11 A. Yes.</p> <p>12 Q. -- right?</p> <p>13 Okay. So Model 1 is described starting on page</p> <p>14 20 under Section 3.1.</p> <p>15 A. Uh-huh.</p> <p>16 Q. Right?</p> <p>17 A. Yes.</p> <p>18 Q. So here the total costs that are referenced here,</p> <p>19 again, is the supply cost build up contained in the rate</p> <p>20 setting workbooks; right?</p> <p>21 A. Yes, I believe that's what it says, yes.</p> <p>22 Q. All right. And as you described earlier, Model 1</p> <p>23 takes the difference between those total costs and the</p> <p>24 variable rate that XOOM charged?</p> <p style="text-align: right;">Page 75</p>	<p>1 Q. And the third dataset that is relevant to the</p> <p>2 calculation under Model 1 is customer usage; right?</p> <p>3 A. Yes, they're quantities, yes.</p> <p>4 Q. So you take customer usage and multiply that by</p> <p>5 supply costs; right?</p> <p>6 A. Okay.</p> <p>7 Q. And then you take customer usage and multiply</p> <p>8 that by the rates; right?</p> <p>9 A. Are you continuing --</p> <p>10 Q. Is that correct so far?</p> <p>11 A. I'm trying to remember exactly how it was</p> <p>12 implemented. It may have just been -- it may have -- it</p> <p>13 may have been implemented as the difference in the rates</p> <p>14 times the quantity.</p> <p>15 Q. Okay. Got it.</p> <p>16 A. I think we're talking about --</p> <p>17 Q. We're saying the same thing.</p> <p>18 A. -- the same general -- I think we're talking</p> <p>19 about the same general thing.</p> <p>20 Q. The -- we're saying the same thing.</p> <p>21 In other words, it's looking at calculating</p> <p>22 everything XOOM charged above total costs.</p> <p>23 A. Yeah. Yeah, above the, the supply costs, total</p> <p>24 costs, the delta times quantities.</p> <p style="text-align: right;">Page 77</p>